



communications with Campbell-Hill were privileged and therefore properly protected from disclosure. *See, e.g.*, Ltr. at 3 (quoting *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 218 (S.D.N.Y. 2001) (“[B]ecause [a] consultant was involved in the activities which were the subject matter of [ ] ensuing litigation, and because the consultant possessed the information that was required by the attorney for informed advice, the consultant’s confidential communications to counsel were protected.”)) In that context, Spirit explained that it engaged Campbell-Hill to “employ[] the consultancy’s expertise in the economics of the aviation sector.” Ltr at 8. Spirit asserted that, for the purpose of the privilege analysis, “when Campbell-Hill was performing the work assigned by Spirit, it was acting as Spirit’s representative *for purposes of assessing corporate privilege under Bieter*.” Ltr. at 8 (emphasis added).

The privilege analysis for *Upjohn* purposes is fundamentally different from the hearsay analysis under FRE 801(d)(2)(D). The relevant question for privilege purposes addressed in that letter was whether Campbell-Hill should be deemed a “client” under the *Upjohn* analysis. The fact that Campbell-Hill could be so considered does not establish that it is an “agent or employee” for all purposes under FRE 801(d)(2)(D), which requires evidence that the declarant should be deemed an agent whose statements bind a party. Here, as noted in Defendants’ Opposition filed earlier today, there is nothing in the record (or the Government’s Motion beyond its conclusory statements) to establish that out-of-court statements of Campbell-Hill should be attributed to Spirit for the purposes of any hearsay exception.

For the foregoing reasons as well as those enumerated in Defendants’ Opposition, Plaintiffs’ motion should be denied.

Dated: November 21, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Samuel N. Rudman, hereby certify that on November 21, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 21st day of November, 2023.

/s/ Samuel N. Rudman

Sameul N. Rudman